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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re OZELL JOHNSON, on Habeas Corpus.	B226111 (Los Angeles County Super. Ct. No. BH006589)

APPEAL from an order of the Superior Court of Los Angeles County, Peter Paul Espinoza, Judge. Reversed and remanded with directions.

Kamala Harris and Edmund G. Brown, Jr., Attorneys General, Julie L. Garland, Senior Assistant Attorney General, Jennifer A. Neill, Linnea D. Piazza and Jennifer Cano, Deputy Attorneys General, for Plaintiff and Appellant.

Uncommon Law, Keith Wattley and Thomas Master for Defendant and Respondent.

In this appeal, we address challenges to the superior court's order regarding respondent Ozell Johnson's petition for writ of habeas corpus. The superior court, in granting the petition, vacated former Governor Arnold Schwarzenegger's decision to reverse a determination by the Board of Parole Hearings (Board) that Johnson is suitable for parole. We conclude that adequate evidence supports the Governor's decision, and therefore reverse.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

A. *Conviction*

Johnson was born in 1955. Although he had no criminal record as a juvenile, he began drinking alcohol and engaging in drug abuse when he was 14 years old. Prior to August 1982, he suffered convictions for battery on a police officer, burglary, grand theft of an automobile, and possession of a controlled substance for sale.

At approximately 11:30 p.m. on August 18, 1982, Johnson and Kenneth Soloman were waiting near a street corner in Los Angeles when Raphael Lawrence, accompanied by his fiancée, drove his car into a driveway. Johnson approached Lawrence as he sat in the car, shot Lawrence in the head, pulled Lawrence from the car, rifled his pockets, and left the scene. Lawrence died the next day. In April 1984, Johnson was arrested after Soloman and other persons identified him as the killer.

On January 9, 1987, Johnson pleaded guilty to second degree murder and admitted personal use of a firearm during the offense (Pen. Code, §§ 187, 12022.5). He also pleaded guilty to possession of phencyclidine for sale (Health & Saf. Code, § 11378.5). Johnson was sentenced to a term of seventeen years to life.

B. *Johnson's Statements Prior to 2007 Parole Consideration Hearing*

Following Johnson's conviction, he offered several accounts of his role in Lawrence's murder. According to a probation report dated January 30, 1987, Johnson denied shooting Lawrence. Johnson stated that on the night of the murder, he was asleep in a car when a gunshot woke him. He found Lawrence lying on the ground and saw Soloman running down the street. Later, in 1990, Johnson told a psychiatric evaluator, "I was just there."

In 1994, Johnson informed a psychiatric evaluator that he and Soloman had intended to rob Lawrence. Johnson further said that he shot Lawrence when Lawrence and Soloman struggled over a gun. A 1994 life prisoner report contained another description of the murder from Johnson. According to the report, when Johnson and Soloman approached Lawrence's car, Lawrence saw them, panicked, and tried to defend himself. Johnson then fired a round which struck Lawrence in the head.

In 2004, Johnson offered the following account: "[W]e both had guns . . . we drew on [Lawrence] and said it's a robbery [. . . . W]hen he was going to get money, I shot him in the head [. . . .] I don't know why [. . . .] I say it was an accident, but I committed the crime [. . . .] I just wanted to scare him."

C. 2007 *Parole Consideration Hearing*

On May 31, 2007, Johnson appeared before the Board for a parole consideration hearing. According to the documentary evidence presented to the Board, during Johnson's incarceration, he had never been cited for significant rule infractions, although he received a minor "counseling chrono" for misuse of a telephone in 2005. He had received his high school diploma, completed several therapy and substance abuse programs, and served as a mentor in some of the

programs. There were numerous letters of support from Johnson's family members, relatives, friends and other individuals. He had several offers of employment upon release, including an offer from a foundation providing services to prisoners.

The Board also considered two psychological evaluations. In 2004, psychologist Elaine L. Mura concluded that during Johnson's incarceration, he had gained "self-awareness and understanding." She assessed his risk of becoming involved in a violent offense if released as "low to moderately low." In May 2007, psychologists Katherine Twohy and Jasmine A. Tehrani stated that Johnson had taken "full responsibility" for the murder. They opined that he posed a "low likelihood" of becoming involved in a violent offense if released.

Johnson expressed remorse for the crime, which he described as "heinous." He stated that he had committed the crime "for economic gain," and denied that he was under the influence of drugs or alcohol when he shot Lawrence. When the Board asked Johnson why he felt the need to shoot Lawrence, Johnson stated: "Feeling the need to have to shoot him? I didn't, I just shot him. . . . I pulled the gun and I pulled the trigger, just like that." He elaborated: "[W]hen I explained myself at my first couple of hearings, I said it was an accident, and then they said I was trying to minimize the crime and I wasn't minimizing the crime . . . . I was telling the truth, . . . but I know that I shot and killed [Lawrence]. But to me, my intentions weren't to kill him, but I shot and killed him." He added: "[M]y intention was to scare him."

Following the hearing, the Board concluded that Johnson was suitable for parole, finding that he "truly appear[ed] to understand the nature and magnitude of the offense" and that he "accepted full responsibility for the crime."

D. *Events Following the Board's 2007 Decision*

On October 18, 2007, Governor Schwarzenegger reversed the Board's decision. Johnson sought relief from this determination by writ of habeas corpus, which was denied.

On June 12, 2008, Johnson again appeared before the Board for a parole consideration hearing. During the hearing, the Board directed Johnson's attention to an account of the murder he had provided to a probation officer in 2006. According to the account, Johnson had fired his gun after Lawrence panicked and tried to defend himself. Johnson stated: "I agree . . . that what's stated there is true." Later in the hearing, he elaborated that he shot Lawrence in a panic after Lawrence and Soloman began to scuffle. He said: "I got nervous because [of] the way they were scuffling[.] [Soloman] had the gun, so my intention was to shoot in the air. [B]ut I shot and it hit [Lawrence]. You know, when I pulled the gun up, I pulled it out and shot towards him and I hit him in the head. The round was supposed to scare him, so they'd stop wr[e]stling so we'd get away from there. [¶] . . . [¶] . . . I was trying to shoot over him[. B]ut I shot him in the head."

During the hearing, the prosecutor argued Johnson's account conflicted with the description of the crime from Lawrence's fiancée. Shortly after the murder, the fiancée stated that when Lawrence drove into the driveway, she bent over to pick up her purse from the car's floorboard. She heard a loud noise and saw Lawrence fall onto the steering wheel. Someone then opened the driver's door, dragged Lawrence out of the car, and searched his pockets. In finding Johnson unsuitable for parole, the Board stated: "While this panel takes nothing away from . . . Johnson's considerable accomplishments, we are not convinced . . . that [he] has yet accepted the totality of what he did by . . . choosing to believe that he did not intend to shoot the victim, but rather to fire a sort of warning shot."

On August 21, 2008, our Supreme Court issued its decisions in *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*) and *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis*), which clarified that parole suitability hinges on an "inmate's current dangerousness" (*Lawrence*, *supra*, 44 Cal.4th at p. 1205, italics deleted; *Shaputis*, *supra*, 44 Cal.4th at p. 1254). In February 2009, the Supreme Court denied Johnson's petition for writ of habeas corpus without prejudice to filing a new petition in superior court in light of *Lawrence*. In March 2009, Johnson sought relief by writ of habeas corpus in superior court, challenging the Governor's decision regarding the Board's 2007 parole suitability determination. On October 14, 2009, the superior court granted the writ. The court stated: "Because the Governor's decision pre[]dates *Lawrence* and the standard articulated therein, the matter is remanded to the Governor, with direction[s] to vacate his . . . 2007 decision and proceed in accordance with due process and the decision of this Court." The Governor did not notice an appeal from this ruling.

On October 22, 2009, while the Governor's review of the Board's 2007 decision was pending, the Board conducted another parole consideration hearing concerning Johnson. Regarding the murder, Johnson said that when Lawrence parked his car, he and Soloman approached the car from different directions, and he "just shot [Lawrence] in the head." Johnson stated: "[Lawrence] didn't see me. I surprised him. I came around the bush in the front of the car and shot him. It was just real fast." When the Board asked, "So what did he do to cause this to happen to him?," Johnson replied, "Nothing." According to Johnson, he had previously characterized the shooting as accidental or the firing of a warning shot to avoid taking full responsibility for what he had done. When the Board asked when Johnson had first admitted that he "shot Lawrence basically in cold blood to rob him," Johnson replied that he had done so no later than 2007.

During the hearing, the prosecutor pointed to the account of the murder Johnson had provided to the Board in 2008, which characterized the shooting as Johnson's nervous response to a scuffle between Soloman and Lawrence. When the prosecutor asked Johnson why he had offered the 2008 account, Johnson replied "I can't answer that, because I said that statement prior, before that." Johnson later added, "I said that Soloman and [Lawrence] were scuffling before."

Aside from this testimony, the Board also considered a June 2009 evaluation of Johnson from psychologist Roberto E. Montalvo, who had interviewed Johnson. Montalvo reported: "When asked why [Johnson] chose to shoot . . . Lawrence, . . . Johnson stated, 'I don't know why I shot.' [Johnson] was reminded that in the May 2009 [Life Prisoner Evaluation,] under 'Prisoner's Version[,]' he reported that the victim 'tried to defend himself' but . . . Johnson was unable to clarify how the victim tried to defend himself. Earlier in the interview . . . Johnson reported that he 'lost control' on the day of his offense but in describing that event he did not describe having felt angry or emotionally out of control." Montalvo concluded: "Regarding insight into his crime, . . . Johnson's narrative of the events lacks the kind of detail and exposition that would suggest a clear understanding of why he committed his offense. He reported that he does not know why he shot . . . Lawrence and in the past he has stated that the gun may have gone off accidentally. At this time [Johnson's] insight into his life crime appears to be limited and deserving of further thought and consideration in order to understand the emotional triggers and/or distorted thoughts that led him to shoot his victim."

Montalvo also assessed several measures of Johnson's risk of violence. According to Montalvo, Johnson had received a low score on a measure of psychopathy; in addition, he posed a moderate risk of violent recidivism on one

measure and a moderate risk of recidivism on another measure. Montalvo opined that overall, Johnson presented a relatively low to moderate risk of violent recidivism if released from prison.

Following the hearing, the Board told Johnson that he was "very close," but nonetheless determined that he was unsuitable for parole. Pointing to Johnson's conflicting accounts of the murder, the Board found that he presented an unacceptable risk of danger if released because he lacked insight into the crime.

E. *Governor's Second Determination Regarding the Board's 2007 Decision*

On November 12, 2009, Governor Schwarzenegger again reversed the Board's 2007 decision. The Governor concluded that although several factors weighed in favor of Johnson's suitability for parole, his release from prison posed an unreasonable risk of danger to society. Aside from the circumstances of the murder, the Governor stated that Johnson had not accepted full responsibility for the crime and lacked insight into the crime, noting Johnson's shifting accounts of the crime, as reported in Montalvo's 2009 evaluation, and Montalvo's conclusion that Johnson had limited insight into his motivation. The Governor noted that at the 2008 and 2009 hearings the Board had found Johnson unsuitable for parole due to "his inadequate understanding of the murder." The Governor further noted Mura's and Montalvo's findings regarding Johnson's likelihood of recidivism, and the fact that Johnson had been counseled for misconduct several times, most recently in 2005.

F. *Underlying Petition for Writ of Habeas Corpus*

On December 1, 2009, Johnson filed the underlying petition for writ of habeas corpus in superior court, seeking to challenge the Governor's November 2009 decision. On June 9, 2010, the superior court granted the petition. Relying on *In re Gray* (2007) 151 Cal.App.4th 379 (*Gray*), the superior court concluded that in rendering his decision, the Governor had improperly considered the record of the Board's proceedings after its 2007 determination, including Montalvo's 2009 evaluation. The superior court further concluded that the record before the Board in 2007 contained no evidence supporting the Governor's decision.

Pointing to *In re Ross* (2010) 185 Cal.App.4th 636 (*Ross*), the Governor sought reconsideration, arguing that he was entitled to rely on the evidence presented to the Board in 2008 and 2009. On July 15, 2010, the superior court denied reconsideration, reasoning that *Gray*, not *Ross*, was correctly decided regarding the record subject to the Governor's review. In addition, the superior court concluded that even if it were to follow *Ross*, the proceedings before the Board in 2008 and 2009 disclosed no evidence supporting the Governor's decision. This appeal followed.[1]

DISCUSSION

Appellant contends that the superior court erred in granting Johnson's petition for writ of habeas corpus. We agree. Because the superior court granted relief without taking new evidence, the question presented on appeal is one of law

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[1] On September 8, 2010, this court granted appellant's petition for writ of supersedeas, which sought to stay enforcement of the superior court's June 9, 2010 and July 15, 2010 orders.

that we resolve de novo. (*In re Lazor* (2009) 172 Cal.App.4th 1185, 1192.) As explained below, we conclude that the Governor properly considered evidence presented to the Board after its 2007 decision, and that the evidence before the Governor adequately supported his reversal of the 2007 decision.

A. *Governing Law*

Under the California Constitution, the Governor is authorized to review parole decisions by the Board "[s]ubject to [the] procedures provided by statute." (Cal. Const., art. V, § 8, subds. (a), (b); *In re Rosenkrantz* (2002) 29 Cal.4th 616, 660 (*Rosenkrantz*).) In conducting the review, the Governor must apply the factors that govern the Board's decisions. (*Shaputis, supra*, 44 Cal.4th at p. 1258.)

By regulation, the Board may properly deny parole "if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison." (Cal. Code Regs., tit. 15, § 2402, subd. (a).) The pertinent regulation, which sets detailed standards and criteria for determining whether an incarcerated individual is suitable for parole, enumerates circumstances tending to show unsuitability for parole, including the circumstances of the crime itself; in addition, it provides that "[c]ircumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability."[2] (Cal. Code Regs., tit. 15, § 2402, subds. (b), (c).) The

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[2] The circumstances tending to indicate unsuitability include: "(1) Commitment Offense. The prisoner committed the offense in an especially heinous, atrocious or cruel manner. The factors to be considered include: [¶] (A) Multiple victims were attacked, injured or killed in the same or separate incidents. [¶] (B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder. [¶] (C) The victim was abused, defiled or mutilated during or after the offense. [¶] (D) The offense was carried out in a manner which demonstrates an exceptionally callous disregard for
(Fn. continued on next page.)

regulation also enumerates circumstances tending to show suitability for parole.[3] (Cal. Code Regs., tit. 15, § 2402, subd. (d).)

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human suffering. [¶] (E) The motive for the crime is inexplicable or very trivial in relation to the offense.

"(2) Previous Record of Violence. The prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim, particularly if the prisoner demonstrated serious assaultive behavior at an early age.

"(3) Unstable Social History. The prisoner has a history of unstable or tumultuous relationships with others.

"(4) Sadistic Sexual Offenses. The prisoner has previously sexually assaulted another in a manner calculated to inflict unusual pain or fear upon the victim.

"(5) Psychological Factors. The prisoner has a lengthy history of severe mental problems related to the offense.

"(6) Institutional Behavior. The prisoner has engaged in serious misconduct in prison or jail." (Cal. Code Regs., tit. 15, § 2402, subd. (c).)

[3] The circumstances tending to indicate suitability include: "(1) No Juvenile Record. The prisoner does not have a record of assaulting others as a juvenile or committing crimes with a potential of personal harm to victims.

"(2) Stable Social History. The prisoner has experienced reasonably stable relationships with others.

"(3) Signs of Remorse. The prisoner performed acts which tend to indicate the presence of remorse, such as attempting to repair the damage, seeking help for or relieving suffering of the victim, or indicating that he understands the nature and magnitude of the offense.

"(4) Motivation for Crime. The prisoner committed his crime as the result of significant stress in his life, especially if the stress has built over a long period of time.

"(5) Battered Woman Syndrome. At the time of the commission of the crime, the prisoner suffered from Battered Woman Syndrome, . . . , and it appears the criminal behavior was the result of that victimization.

"(6) Lack of Criminal History. The prisoner lacks any significant history of violent crime.

"(7) Age. The prisoner's present age reduces the probability of recidivism.

"(8) Understanding and Plans for Future. The prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release.

"(9) Institutional Behavior. Institutional activities indicate an enhanced ability to function within the law upon release." (Cal. Code Regs., tit. 15, § 2402, subd. (d).)

Although the Governor assesses the factors that govern the Board's decisions, "the Governor's interpretation of a documentary record is entitled to deference." (*Shaputis*, *supra*, 44 Cal.4th at p. 1258.) Our Supreme Court has explained: "[T]he Governor undertakes an independent, de novo review of the inmate's suitability for parole. [Citation.] Accordingly, the Governor has discretion to be 'more stringent or cautious' in determining whether a defendant poses an unreasonable risk to public safety. [Citation.] When a court reviews the record for some evidence supporting the Governor's conclusion that a petitioner currently poses an unreasonable risk to public safety, it will affirm the Governor's interpretation of the evidence so long as that interpretation is reasonable and reflects due consideration of all relevant statutory factors. [Citation.]" (*Ibid*.)

B. *Evidence Considered by the Governor*

We begin by examining whether the Governor properly considered the evidence submitted to the Board during the 2008 and 2009 parole suitability hearings. Subdivision (a) of Penal Code section 3041.2 provides: "During the 30 days following the granting, denial, revocation, or suspension by a parole authority of the parole of a person sentenced to an indeterminate prison term based upon a conviction of murder, the Governor, when reviewing the authority's decision . . . shall review materials provided by the parole authority."[4] The key question is whether this provision restricted the Governor's review of the Board's 2007 decision, upon remand following the grant of the writ of habeas corpus, to the evidence admitted at the 2007 parole suitability hearing.

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[4] All further statutory references are to the Penal Code, unless otherwise indicated.

As the superior court noted, there is a division among the courts regarding this question. In concluding that the Governor had improperly considered the evidence from the 2008 and 2009 Board hearings, the superior court relied on *Gray*, *supra*, 151 Cal.App.4th at page 379. There, the Board found an inmate suitable for parole in 2005 (*id*. at p. 383). After the Governor reversed this decision, the inmate successfully sought relief by writ of habeas corpus in the superior court, which remanded the matter to the Governor to reconsider the 2005 Board decision in accordance with due process. (*Id*. at p. 384.) When the Governor again found him unsuitable for parole, the inmate filed a petition for writ of habeas corpus in the Court of Appeal, which granted the petition. (*Id*. at p. 410.)

In so ruling, the appellate court in *Gray* concluded that the Governor had improperly considered evidence presented to the Board at a 2006 parole suitability hearing. (*Gray*, *supra*, 151 Cal.App.4th at p. 402.) To support this conclusion, the court relied on *In re Smith* (2003) 109 Cal.App.4th 489 (*Smith*) and another case (*In re Scott* (2005) 133 Cal.App.4th 573, 603) whose reasoning rests solely on *Smith*. (*Gray*, *supra*, 151 Cal.App.4th at p. 402.) In *Smith*, the Board found an inmate suitable for parole in 2000. (*Smith*, *supra*, at p. 492.) During Governor Gray Davis's initial review of the Board's decision, he considered letters from a sheriff's department that had not been presented to the Board, and reversed the Board's determination. (*Id*. at p. 505.) After the inmate secured a writ of habeas corpus in the superior court, which ordered the Governor to release the inmate, the Governor appealed. (*Id.* at pp. 500-501.) In affirming the writ, the appellate court concluded that the Governor had improperly considered evidence never presented to the Board. (*Id*. at p. 505.) In addition, the court held that under the circumstances, a remand to the Governor to reconsider his decision amounted to

an idle act, as his review would be limited to the record of the 2002 Board hearing, which disclosed no evidence to support his decision. (*Id*. at pp. 506-507.)

In relying on *Gray*, the superior court below rejected *Ross*, *supra*, 185 Cal.App.4th 636. In *Ross*, the Board determined that the pertinent inmate was suitable for parole in 2006. (*Ross, supra,* at p. 642). After the Governor reversed this decision, the inmate filed a petition for writ of habeas corpus in the appellate court, which granted the writ and remanded the matter to the Governor to reconsider the 2006 Board decision in accordance with due process. (*Id*. at p. 639.) In 2009, upon remand, the Governor considered evidence first presented to the Board at a 2008 parole suitability hearing, and again reversed the 2006 decision. (*Id*. at p. 642.) The inmate filed another petition for writ of habeas corpus in the appellate court, contending that the Governor had improperly relied on evidence not presented to the Board in 2006. (*Id*. at p. 644.)

In rejecting this contention, the appellate court in *Ross* concluded that neither its remand order nor any other legal authority barred the Governor from considering the evidence presented to the Board in 2008. (*Ross, supra*, 185 Cal.App.4th at pp. 645-647.) The court observed that section 3041.2, subdivision (a), requires only that the Governor, when reviewing the authority's decision "'shall review materials *provided* by the parole authority.'" (*Ross, supra*, at p. 646.) The court further reasoned: "[I]f for the proceeding on remand, the Board provides the Governor with new evidence (i.e., evidence unavailable when the parole decision was made but regarding which the prisoner has had an opportunity to respond (Pen. Code § 3041.5, subd. (a)(1)) that the prisoner would pose an unreasonable risk to public safety if released, it must be considered by the Governor. This is so because 'public safety is the overarching consideration for both the Board and the Governor [in determining whether a prisoner who is

serving an indeterminate sentence should be released from prison].'" (*Id*. at p. 645, quoting *Lawrence, supra*, 44 Cal.4th at p. 1209.)

The court in *Ross* distinguished decisional authority that appeared to support the contrary conclusion. (*Ross, supra*, 185 Cal.App.4th at pp. 646-647.) The court discussed *Rosenkrantz, supra*, 29 Cal.4th 616, in which our Supreme Court examined the contention that the constitutional doctrine of separation of powers bars courts from reviewing the Governor's parole suitability decisions rendered under section 3041.2 (*Rosenkrantz, supra*, at pp. 661-667). The Supreme Court, in rejecting this contention, remarked that judicial review encompasses whether the Governor's decision "is supported by some evidence in the record that was before the Board." (*Rosenkrantz*, at p. 667.) The *Ross* court concluded that this remark provided no guidance on the issue presented in *Ross*, as the Supreme Court had not addressed the issue, and the remark did not accurately reflect the statutory language of section 3041.5, subdivision (a). (*Ross, supra*, at p. 646; see *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 127 [cases are not authority for propositions not considered].)[5]

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[5] The court in *Ross* reasoned: "*Rosenkrantz* was the review of a Governor's parole suitability finding made during the 30 days following the Board's parole decision (Pen. Code § 3041.2, subd. (a)). Here, in contrast, long after the Board found in 2006 that Ross was suitable for parole, the Governor was directed by this court to reconsider his decision reversing the Board's finding. For such a review on remand, use of the 'some evidence in the record that was before the Board' language of *Rosenkrantz* would defeat the duty of the Governor to apply the *current dangerousness* standard. Besides, the evidence 'before the Board' language in *Rosenkrantz* does not mirror the statutory language saying the Governor "'shall review materials *provided by* the parole authority.' (Pen. Code § 3041.2, subd. (a), italics [original].)" (*Ross, supra*, 185 Cal.App.4th at p. 646.)

The court in *Ross* also noted that some appellate court decisions appear to support the view that the Governor, upon remand following the granting of a writ of habeas corpus, must reconsider a parole suitability decision on the basis of the evidence before the Board at the original hearing. (*Ross, supra*, 185 Cal.App.4th at pp. 646-647.) Although the court did not mention *Gray* or *Smith*, it pointed to another case whose brief discussion is entirely predicated on *Smith*, namely, *In re Smith* (2003) 114 Cal.App.4th 343, 374. (*Ross*, *supra*, 185 Cal.App.4th at pp. 646-647.) Regarding such cases, the court in *Ross* stated: "[T]hey involved a Governor's parole finding made during the 30 days following the Board's decision, rather than a Governor's finding long thereafter in response to a court's direction to reconsider the matter. Thus, they are inapposite . . . for the reasons stated above." (*Ibid*.)

We conclude that *Ross*, rather than *Gray*, represents the better view regarding the evidentiary record available to the Governor upon remand. The analysis in *Ross* respects the language of section 3041.2, subdivision (a), while promoting the "overarching consideration" served by the statute, namely, public safety. (*Lawrence, supra,* 44 Cal.4th at p. 1209.) In view of the regulations governing parole suitability decisions, the Governor is obliged to consider "[a]ll relevant, reliable information" available to the Board in determining whether an inmate is suitable for parole. (See Cal. Code Regs., tit. 15, § 2402, subd. (b).) In contrast, *Gray* and the other cases we have noted rely entirely on *Smith*, which did not address the issue presented here, namely, whether the Governor, upon remand, must disregard evidence "provided by the parole authority" (§ 3041.2, subd. (a)) that bears on an inmate's current dangerousness, even though the inmate has had a

full opportunity to address the evidence before the Board. We therefore do not regard *Smith* and its progeny, including *Gray*, as persuasive on this issue.[6]

In a related contention, Johnson maintains that the doctrine of res judicata bars the Governor from making new determinations on matters resolved against him in October 2009, when the superior court granted Johnson's petition for writ of habeas corpus regarding the Governor's initial parole suitability decision. In granting the writ, the superior court concluded, on the basis of the 2007 Board proceedings, that Johnson had accepted full responsibility for his offense; that both the Board and the 2007 psychological evaluations indicated that he had adequate insight and remorse; and that his post-conviction record "strongly support[ed] a finding that he no longer poses a danger to public safety." Johnson argues that these determinations are binding on the Governor, as he did not appeal the October 2007 ruling. We disagree.

Collateral estoppel, an aspect of res judicata, ordinarily bars the relitigation of an issue decided at a previous proceeding "'if (1) the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated; (2) the previous [proceeding] resulted in a final judgment on the

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[6] For similar reasons, we discern little or no guidance from *In re Arafiles* (1992) 6 Cal.App.4th 1467 (*Arafiles*) or *Lawrence*, upon which Johnson relies on appeal. In *Arafiles*, the appellate court concluded that the Governor, in reviewing a suitability determination by the Board, had improperly considered materials never presented to the Board. (*Arafiles, supra*, at pp. 1474-1477.) That is not the situation before us. In *Lawrence*, the Governor reversed a parole suitability determination made by the Board in 2005. (*Lawrence, supra*, 44 Cal.4th at p. 1201.) Respondent observes that in 2008, our Supreme Court ultimately affirmed the Board's determination on the Board's 2005 record, without remanding the matter to the Governor to reconsider his decision in light of any new evidence presented to the Board after 2005. However, as the propriety of a remand for this purpose was never raised or discussed in *Lawrence*, it is not authority on this question.

merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding].' [Citation.]" (*People v. Sims* (1982) 32 Cal.3d 468, 484, fn. omitted.) Nonetheless, when these requirements are met, the application of the doctrine is not automatic because it is ultimately subject to considerations of public policy. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 342-343.) As our Supreme Court has explained, "the public policies underlying collateral estoppel -- preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation -- strongly influence whether its application in a particular circumstance would be fair to the parties and constitutes sound judicial policy." (*Id*. at p. 343.)

Although the Supreme Court has yet to address the application of collateral estoppel to parole suitability determinations (see *Rosenkrantz*, *supra*, 29 Cal.4th at p. 668, fn. 15), we find dispositive guidance on Johnson's contention in *In re Prather* (2010) 50 Cal.4th 238. There, the Supreme Court addressed the extent to which the courts, in remanding parole suitability determinations to the Board, may limit the Board's consideration of evidence. (*Id*. at pp. 243-244.) The court concluded that the Board is bound by judicial suitability findings and conclusions, insofar as they are predicated on the record before the reviewing court. (*Id*. at pp. 257-258.) Nonetheless, the court further concluded that under the doctrine of the separation of powers, the courts cannot restrict the Board's discretion to make appropriate determinations on the basis of new evidence. (*Id*. at pp. 258-259.) Although *Prather* does not address the analogous issue regarding the Governor, the executive branch generally has "inherent and primary authority" over parole matters (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 667). In view of *Prather*, public policy weighs decisively against the application of collateral estoppel to bar the

Governor from making new findings based on the expanded record discussed above.

C. *The Governor's 2009 Decision*

We next examine whether there is adequate evidence in the expanded record to support the Governor's 2009 parole suitability decision.

1. *Standards of Review*

In *Lawrence*, the Supreme Court clarified the role of the courts in reviewing the decision: "[W]hen a court reviews a decision of . . . the Governor, the relevant inquiry is whether some evidence supports the decision of . . . the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings. (*Lawrence*, *supra*, 44 Cal.4th at p.1212, italics deleted.) The court further explained: "[A]lthough . . . the Governor may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post[-]incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative of the statutory determination of a continuing threat to public safety." (*Id*. at p. 1214.)

Instructive applications of the standard of review are found in *Lawrence* and its companion case, *Shaputis*. In *Lawrence*, the inmate had been sentenced to life imprisonment with the possibility of parole in 1983 because she murdered the wife

of her lover. (*Lawrence*, *supra*, 44 Cal.4th at pp. 1192-1193.) After 1993, her psychological evaluations uniformly concluded that she no longer represented a significant danger to society. (*Id*. at p. 1194-1195.) During her incarceration, she was free of serious discipline, participated in many volunteer and charitable programs, and earned a bachelor's degree. (*Ibid*.) After the Governor found her unsuitable for parole in 2006, the Supreme Court concluded that there was no evidence to support a determination that the petitioner remained a threat to public safety, in view of her "extraordinary rehabilitative efforts specifically tailored to address the circumstances that led to her criminality, her insight into her past criminal behavior, her expressions of remorse, her realistic parole plans, the support of her family, and numerous institutional reports justifying parole, as well as the favorable discretionary decisions of the Board." (*Id*. at p. 1226.)

In *Shaputis*, the Supreme Court reached a contrary conclusion. (*Shaputis*, *supra*, 44 Cal.4th at p. 1245.) There, the inmate, who had a history of criminal activity, domestic violence, and alcohol abuse, had been sentenced to a term of 15 years to life in 1987 for the murder of his wife. (*Id*. at pp. 1245-1247.) While in prison, he participated in alcohol abuse programs and other forms of therapy, was discipline-free, and was evaluated as presenting a low risk for violence absent a relapse into alcoholism. (*Id*. at pp. 1249-1250.) In 2006, after the Board found him suitable for parole, the Governor rejected its recommendation, pointing to the circumstances of the crime and the inmate's lack of insight regarding it. (*Id*. at pp. 1251-1253.) In affirming the Governor's decision, the Supreme Court placed special emphasis on the inmate's lack of insight, notwithstanding his expressions of remorse: although the record showed that the murder was intentional, the inmate maintained that his wife's death was accidental, thus demonstrating that he lacked insight into his antisocial behavior. (*Id*. at p. 1260.) The court held that the

gravity of the inmate's offense, coupled with his lack of insight and failure to accept responsibility, outweighed any factors favoring suitability for parole. (*Id*. at p. 1261.)

Our examination of the Governor's decision follows these governing principles. As our Supreme Court has explained, "the relevant inquiry for a reviewing court is . . . whether the [facts identified by the Governor] are probative to the central issue of current dangerousness when considered in the light of the full record before . . . the Governor." (*Lawrence*, *supra*, 44 Cal.4th at p. 1221, italics omitted.) As explained above (see pt. B., *ante*), the "full record" here includes the proceedings before the Board in 2008 and 2009. Moreover, although the Governor based his decision on the record of the Board proceedings, he acted as trier of fact. (*In re Smith* (2009) 171 Cal.App.4th 1631, 1638.) As such, he was permitted to draw inferences from the evidence and make credibility determinations regarding Johnson's testimony. (*Ibid*.; *In re Tripp* (2007) 150 Cal.App.4th 306, 318.) We defer to the Governor's determinations on these matters, to the extent they are reasonable. (*In re Smith*, *supra*, 171 Cal.App.4th at p. 1638; *In re Tripp*, *supra*, 150 Cal.App.4th at p. 318.)

2. *Analysis*

For the reasons explained below, we conclude that "some evidence" supports the Governor's decision (*Lawrence*, *supra*, 44 Cal.4th at p.1212). To begin, there is ample evidence to support the Governor's determinations regarding the egregious circumstances of the murder, namely, that it involved multiple victims, displayed "an exceptionally callous disregard for human suffering," and served a trivial motive. (Cal. Code Regs., tit. 15, § 2402, subds. (c)(1)(A), (c)(1)(D), (c)(1)(E).) The record establishes that Johnson and Soloman selected

the occupants of Lawrence's car at random for robbery, and that Johnson left Lawrence fatally wounded after shooting him.

There is also sufficient evidence to support the Governor's determination that Johnson shot Lawrence in a dispassionate, execution style manner (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1)(B)). According to Lawrence's fiancée, Johnson shot Lawrence with no prior interaction or warning. Johnson appeared to acknowledge as much at the 2009 Board hearing, as he testified that he approached Johnson's car and "just shot [Lawrence] in the head."

The remaining question is whether the Governor identified other factors probative of Johnson's current dangerousness. Here, the Governor placed special emphasis on Johnson's failure to take full responsibility for the crime and his lack of insight into it. On these matters, the Governor observed that over a lengthy period encompassing Johnson's 2009 psychological evaluation, Johnson had offered conflicting accounts regarding the crime, each of which minimized his role in the murder. Johnson had said (1) that he shot Lawrence by accident, (2) that he shot Lawrence in the course of firing a warning shot, and (3) that he shot Lawrence in response to the victim's acts of self-defense. During the same period, Johnson also told psychological evaluators that he did not know why he fired his gun, and sometimes suggested that he acted in a state of emotion. As the Governor noted, the 2009 evaluation by Montalvo one month before the Board hearing concluded that "[Johnson's] insight into his life crime appears to be limited and deserving of further thought and consideration in order to understand the emotional triggers and/or distorted thoughts that led him to shoot his victim."[7]

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[7] Montalvo noted, that although Johnson apparently maintained as recently as one month before the interview that he acted when the victim "tried to defend himself," he
(Fn. continued on next page.)

In view of *Shaputis*, we conclude that these determinations, considered in the light of the full record, identify facts probative of Johnson's current dangerousness. As noted above, the record establishes that Johnson shot Lawrence in a coldblooded manner. However, prior to the 2009 Board hearing, Johnson offered conflicting accounts of the crime that minimized his responsibility. In 2007, Johnson told the Board that he fired his gun with the intention of scaring Lawrence. In 2008, Johnson offered the Board a different account, stating that he fired the gun in a nervous panic when Lawrence and Soloman began to scuffle. According to Montalvo's report, in 2009, before the Board hearing, Johnson had reaffirmed that Lawrence had tried to defend himself and then told Montalvo, "'I don't know why I shot.'"

Johnson's deficiencies in insight and the acceptance of responsibility did not end at the 2009 Board hearing. Although he repudiated his earlier accounts, he asserted to the Board that he had abandoned all such accounts prior to the 2007 Board hearing. When the Board pointed out that his assertion conflicted with Montalvo's then-recent report, Johnson acknowledged the discrepancy without attempting to explain it. Later, when the prosecutor asked why he told the Board the year before that he shot Lawrence during a scuffle between Lawrence and Soloman, Johnson said, "I can't answer that," and suggested that he made no such remarks in 2008. In finding Johnson unsuitable for parole, the Board determined that Johnson's ever-shifting accounts of the crime showed an ongoing lack of understanding regarding his reasons for shooting Lawrence. The Board concluded

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could not elaborate on how Lawrence did so. During Montalvo's interview, Johnson stated he "'lost control,'" but in describing the event, gave no indication he was angry or out of control.

that Johnson's lack of insight into his motivation for killing Lawrence rendered him a risk of danger if released. We see no error in the Governor reaching the same conclusion.

Johnson contends that the Governor's determinations regarding Johnson's failure to take responsibility contravene subdivision (b) of section 5011, which provides that the Board "shall not require, when setting parole dates, an admission of guilt to any crime for which an inmate was committed." We disagree. Referring to Johnson's varying versions of the crime as recently as Montalvo's 2009 psychological evaluation, the Governor stated: "'Johnson is not required to admit to the life offense to be found suitable for parole. However, I am not required to accept his explanation, and I do not. His continued insistence that he did not intend to kill [Lawrence] is not supported by the record.'" As explained above, the Governor properly determined the circumstances of the crime and concluded, on the basis of Johnson's conflicting accounts, that Johnson lacked insight into his reasons for killing Lawrence.

Johnson's reliance on *In re Aguilar* (2008) 168 Cal.App.4th 1479 (*Aguilar*) and *In re Palermo* (2009) 171 Cal.App.4th 1096 (*Palermo*), overruled on another point by *In re Prather, supra*, 50 Cal.4th 238 is misplaced. In *Aguilar*, the appellate court held the Governor could not base a parole unsuitability decision on the prosecutor's opposition to parole, which tendered the argument that the inmate "must accept responsibility for his crime before he can be granted parole." (*Aguilar*, *supra*, 168 Cal.App.4th at p.1491.) As the court noted, the argument appeared to contravene section 5011, subdivision (b). (*Aguilar*, *supra*, at p. 1491.) Here, the Governor's decision does not rely on such an argument.

In *Palermo*, the inmate seeking parole had been convicted of second degree murder after a jury trial, but he maintained throughout his incarceration (as he did

at trial) that the killing was the unintentional result of an accidental shooting. (*Palermo*, *supra*, 171 Cal.App.4th at pp. 1103, 1100-1112.) In finding the inmate unsuitable for parole, the Board concluded that the inmate's insistence that he was guilty only of manslaughter established his lack of insight into his crime. (*Id*. at p. 1110.) The appellate court held that under the circumstances, the Board's determination amounted to an indirect requirement that the inmate admit that he committed second degree murder, in violation of section 5011, subdivision (a). (*Id*. at pp. 1110-1112.) That is not the case here. Johnson's inconstant accounts of the crime itself and of his reasons for shooting Lawrence manifest a lack of insight into the crime, and thus are probative of his current dangerousness.[8]

Johnson also challenges two other factors the Governor offered in support of his decision. He argues that the Governor improperly relied on certain unfavorable results in Montalvo's 2009 psychological evaluation while disregarding Montalvo's overall assessment of his risk of violent recidivism; in addition, he maintains that the Governor incorrectly placed reliance on Johnson's

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[8] During oral argument on February 14, 2011, Johnson's counsel directed our attention to *In re Macias* (2010) 189 Cal.App.4th 1326, review granted Mar. 2, 2011, S189107 (*Macias*), decided after Johnson's brief was filed. In *Macias*, the appellate court determined, on the basis of *Shaputis* and other cases, that discrepancies between the established facts of a crime and the inmate's version of them show the inmate's current dangerousness only when they "manifest[] a blindness concerning the nature of his or her conduct and/or the very pressures, circumstances, and impulses that triggered it." (*Macias*, at p. 1345.) Nothing in *Macias* conflicts with our conclusion here regarding the Governor's decision. As indicated above, since the time of oral argument, review has been granted in *Macias*.

"counseling chronos."[9] We reject these contentions. Unfavorable aspects of psychological evaluations and "counseling chronos" may be considered in parole suitability decisions. (*In re Bettencourt* (2007) 156 Cal.App.4th 780, 806 [Board properly relied on unfavorable test results reported in evaluation in finding inmate unsuitable for parole]; *In re Reed* (2009) 171 Cal.App.4th 1071, 1083-1086 [Board correctly relied in counseling chronos in finding inmate unsuitable for parole].) In sum, because some evidence supports the Governor's decision to reverse the Board's 2007 determination, the trial court erred in granting the writ of habeas corpus.

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[9] The Governor noted that Montalvo found that Johnson posed a moderate risk of violent recidivism on one measure and a moderate risk of recidivism on another measure. The Governor also observed that Johnson had been counseled for misconduct several times. The Governor elaborated: "Though [Johnson] was not disciplined for any serious rules violations during his incarceration, the fact that Johnson still engaged in behavior contrary to prison rules as recently as 2005 demonstrates that he is not yet ready to conform his conduct within society's laws and comply with the conditions of parole."

DISPOSITION

The order granting the petition for writ of habeas corpus is reversed, and the matter is remanded to the superior court to vacate the order and enter a new order denying the petition.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.